(1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

DUANE LYNN,

Petitioner,

v.

HON. PETER C. REINSTEIN, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA,

Respondent,

and

RICHARD GLASSEL; STATE OF ARIZONA,

Real Parties in Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Eighth Amendment erect a *per se* bar against States permitting crime victims to offer an opinion on the appropriate sentence in capital cases?

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OPINIONS BELOW

The opinion of the Arizona Supreme Court is reported at 68 P.3d 412 (Ariz. 2003) and is reproduced herein at App. 1. The opinion of the Arizona Court of Appeals is not reported and is reproduced herein at App. 15. The opinion of the trial court is not reported and is reproduced herein at App. 19.

JURISDICTION

The Arizona Supreme Court filed its opinion on May 19, 2003, and issued its mandate on June 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment of the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Arizona Constitution, article II, section 2.1(A):

> To preserve and protect victims' rights to justice and due process, a victim of crime has a right:
>
> 1. To be treated with fairness, respect, and dignity, and to be free from intimidation,

harassment or abuse, throughout the criminal justice process.

* * *

4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.

* * *

11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

Ariz. Rev. Stat. section 13-4426(A) (2001):

> The victim may present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at any aggravation, mitigation, presentencing or sentencing proceeding.

STATEMENT OF THE CASE

On April 19, 2000, Richard Glassel, armed with several handguns and an assault rifle, walked into a crowded meeting of the Ventana Lakes Homeowners Association and opened fire, killing Nila Lynn and Esther La Plante and wounding three others. On December 9, 2002, a jury convicted Glassel of two counts of first degree murder, qualifying Glassel for the death penalty based on the multiple homicides as an aggravating factor.

Petitioner Duane Lynn witnessed the murder of his wife Nila. Prior to trial, Petitioner asked the court to allow him, should Glassel be convicted, to tell the jury about his wife and the pain caused by her murder and also to recommend, notwithstanding his loss, that the jury not sentence Glassel to death but rather to life imprisonment. The State objected to Petitioner's request to recommend a sentence; Glassel did not.

On November 12, 2002, the trial court ruled that Petitioner may present a victim impact statement to the jury but may not recommend a sentence. Reasoning that a victim's view of the appropriate sentence is not relevant as a factor either in mitigation or in aggravation, the court held that "[a] victim's capital recommendation, whatever it may be, is not admissible in this case." App. 23. On December 23, 2002, the Arizona Court of Appeals accepted Petitioner's special action seeking reversal of the trial court decision, but denied relief because it thought victim recommendations are constitutionally irrelevant to the sentencing decision. App. 15. On January 7, 2003, the Arizona Supreme Court granted the Petition for Review but denied a stay of the sentencing proceedings pending its decision. On January 10, 2003, the jury sentenced Glassel to death, without having heard Petitioner's plea for life.

The Arizona Supreme Court affirmed, holding that "the Eighth Amendment to the United States Constitution prohibits a victim from making a sentencing recommendation to the jury in a capital case." App. 4. The court acknowledged that, as a victim, Petitioner is entitled under the Arizona Constitution to "'be heard at any proceeding involving . . . sentencing,'" App. 4 (quoting Ariz. Const. art. II, § 2.1(A)(4) (alterations in original)), and under Arizona

law to offer "'opinions that concern . . . the sentence . . . at any aggravation, mitigation, presentencing, or sentencing proceeding.'" App. 4-5 (quoting Ariz. Rev. Stat. § 13-4426(A) (2001) (alterations in original)). Nevertheless, the court held that the Eighth Amendment bars the victim from recommending a sentence and therefore did not decide "whether Arizona law would permit such a recommendation." App. 4 n.2.

The court expressly recognized a conflict on whether the Eighth Amendment erects a *per se* bar against victim sentencing recommendations in capital cases between the Oklahoma Court of Criminal Appeals, see *Ledbetter* v. *State*, 933 P.2d 880 (Okla. Crim. App. 1997), and the Court of Appeals for the Tenth Circuit, see *Hain* v. *Gibson*, 287 F.3d 1224 (10th Cir. 2002), and joined the split in favor of the Tenth Circuit. App. 10.

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court held that it constitutes cruel and unusual punishment for the husband of a murdered woman to seek leniency for his wife's killer. The decision thus squarely presents the question whether the Eighth Amendment erects a *per se* bar against a victim's sentencing recommendation in a capital case. The Court deferred this question in *Payne* v. *Tennessee*, 501 U.S. 808 (1991), although the opinion in that case was ambiguous as to what portions, if any, of *Booth* v. *Maryland*, 482 U.S. 496 (1987), survived.

This ambiguity has created a clear split of authorities in the lower courts. The Court of Appeals for the Tenth Circuit agrees with the court below that the Eighth

Amendment erects a *per se* bar to victim opinions about the appropriate sentence in capital cases. See *Hooper* v. *Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002); *Hain* v. *Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002). By contrast, the Oklahoma Court of Criminal Appeals, the State's criminal court of last resort, has definitively reached the opposite conclusion and consistently permits victims in capital cases to recommend the appropriate sentence. *Murphy* v. *State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 123 S. Ct. 1795 (2003); *Turrentine* v. *State*, 965 P.2d 955, 980 (Okla. Crim. App. 1997), *cert. denied*, 525 U.S. 1057 (1998); *Ledbetter* v. *State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997); *Conover* v. *State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997).[1]

Because this Court's opinions in *Booth* and *Payne* are the source and center of this controversy, only this Court can settle the dispute. There is no value in letting the conflict percolate further because courts on both sides of the split have, after expressly considering the alternative, conclusively and repeatedly stated their conflicting opinions. Indeed, the Oklahoma Court of Criminal Appeals has

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[1] Even leaving aside this clear and explicit disagreement, confusion reigns among the courts below as to whether victim recommendations are constitutionally relevant to the sentencing decision, whether they are relevant but unconstitutionally prejudicial to the sentencing decision, and whether admitting such recommendations is unconstitutional but harmless error. See, *e.g.*, Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C.L. REV. 517, 528 (2000) (reviewing authorities and noting that "it is readily apparent that marked uncertainty now persists over the extent, and indeed the continued existence, of the prohibition [against victim sentencing recommendations] ostensibly established in *Booth*").

interpreted this Court's denial of past petitions for certiorari presenting the question as implicit approval of its position, see *Murphy*, 47 P.3d at 885, a position that the court below acknowledged but with which it expressly disagreed.

The question presented is a matter of national importance. Successive Congresses have considered, and different Administrations have supported, constitutional amendments to "keep the balance true"[2] between the rights of victims and those of criminal defendants. The current bipartisan proposal, Senate Joint Resolution 1, guarantees victims the right to participate in sentencing proceedings and is supported by the President and Attorney General of the United States and forty-two State attorneys general.[3] By resolving the conflict below about the extent to which States may afford crime victims the right to make sentencing recommendations, this Court would provide the legal clarity necessary for the political branches and the States to consider more fully the decision to amend the U.S. Constitution and the content of any such amendment.

This case presents the ideal vehicle for the Court to resolve the conflict in the lower courts and to clarify the law. The court below acknowledged that Arizona law afforded Petitioner the right to offer an opinion of the appropriate sentence, but thought that the Eighth Amendment, without

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[2] *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).

[3] Forty-nine State governors endorsed a prior version of the proposed amendment. The National Governors Association will consider endorsement of Senate Joint Resolution 1 in the Fall of 2003.

exception, bars such opinions. Petitioner would have recommended life; the State opposed such a recommendation; and the criminal defendant supported Petitioner's right to recommend life but argued that a recommendation of death would violate the Eighth Amendment. The Court therefore has the unique opportunity to consider whether the Constitution bars all victim recommendations, only those that favor death, or only those that are unduly inflammatory or prejudicial, thereby addressing the panoply of questions relevant to the conflict and confusion in the lower courts.

This Court, and only this Court, can answer these interrelated questions with a straightforward clarification: The holding in *Payne* v. *Tennessee* that "the Eighth Amendment erects no *per se* bar," 501 U.S. at 827, against victim statements to the jury extends to statements about the appropriate sentence. "There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* Any risk that such recommendation would be unduly prejudicial is addressed by the evidentiary rules, under which "courts routinely exclude evidence that is unduly inflammatory," *id.* at 831 (O'Connor, J., concurring), or by the Due Process Clause, in cases where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair." *Id.*

I. The Lower Courts Are Irreconcilably Split on Whether the Eighth Amendment Erects a *Per Se* Bar Against Victim Opinions About the Appropriate Sentence in Capital Cases.

This case centers on an ambiguity created by dictum in *Payne* v. *Tennessee*, 501 U.S. 808 (1991). The Court in that case overruled *Booth* v. *Maryland*, 482 U.S. 496

(1987), and held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827. The Court stated in passing, and apparently in error, that "*Booth* also held that the admission of a victim's family members' characterizations and opinion about the crime, the defendant, and *the appropriate sentence* violates the Eighth Amendment." *Id.* at 830 n.2 (emphasis added). Noting that the victim in *Payne* did not present her view of the appropriate sentence, the Court implicitly reserved the question whether the Eighth Amendment barred admission of such views. *Ibid.*

The ambiguity created by the Court's apparently erroneous reading of *Booth* has resulted in a clear split of authorities in the lower courts. The Court of Appeals for the Tenth Circuit has held that *Payne*, by implicitly reserving the question, left intact *Booth*'s purported prohibition against victim sentencing recommendations. *Hain* v. *Gibson*, 287 F.3d 1224 (10th Cir. 2002). Other courts have agreed.[4] In its opinion below, the Arizona Supreme Court delved further and correctly noted that "the facts in *Booth* make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing." App. 8 n.4. However, deferring to the Court's dictum in *Payne* that characterized *Booth* as prohibiting sentencing recommendations, the court below agreed with the Tenth Circuit that the

[4] See nn. 6-15, *infra*.

purported bar against victim sentencing recommendations survived *Payne*.

By contrast, the Oklahoma Court of Criminal Appeals, the State's criminal court of last resort, has definitively reached the opposite conclusion and consistently permits victims in capital cases to recommend the appropriate sentence. See *Murphy* v. *State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 123 S. Ct. 1795 (2003). The reasoning is straightforward: *Payne* did not preserve a *per se* bar against victim recommendation because *Booth* did not address sentencing recommendations and therefore erected no such bar. Any suggestion that States may not permit victims to recommend the appropriate sentence is contradicted by the holding in *Payne* that "the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827.

The conflict will not be resolved without this Court's intervention. In its opinion below, the Arizona Supreme Court expressly recognized the disagreement and joined the split in favor of the Tenth Circuit. The Tenth Circuit likewise has acknowledged its conflict with the Oklahoma Court of Criminal Appeals and characterized the latter's position as so contrary to clearly established Supreme Court precedent to warrant habeas review.[5] For its part, the Oklahoma Court of Criminal Appeals has interpreted this Court's denial of repeated petitions for certiorari presenting the question as implicit approval of its position,

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[5] See *Hooper* v. *Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) ("Although the OCCA concluded the trial court properly admitted this testimony, we agree with Petitioner that the trial court's decision to admit the testimony is contrary to clearly established Supreme Court precedent. See 28 U.S.C. 2254(d)(1).")

see *Murphy*, 47 P.3d at 885, and rejected any "contention that our interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Ibid.*

A. This Court Has Identified and Reserved the Question Presented, but in a Manner that Has Caused Confusion Below.

The source of this controversy is dictum in *Payne* v. *Tennessee*, 501 U.S. 808 (1991). The Court there held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827. In so holding, the Court overruled *Booth* v. *Maryland*, 482 U.S. 496 (1987), which prohibited the admission of such a victim impact statement.

The Court in *Payne* limited the scope of its decision with the following:

> Our holding today is limited to the holdings of *Booth* v. *Maryland*, 482 U.S. 496 (1987) and *South Carolina* v. *Gathers*, 490 U.S. 805 (1989) that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and *the appropriate sentence* violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Payne, 501 U.S. at 830 n.2 (emphasis added). See also *id.* at 833 (O'Connor, J., concurring) ("*Booth* also addressed another kind of victim impact evidence – opinions of the

victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial.")

The problem is that, despite the above language, the Court in *Booth* was not presented with, did not address, and erected no bar against victims' characterizations about the appropriate sentence. As the Arizona Supreme Court below summarizes the matter:

> The victims' statements in *Booth* only indirectly hinted at the punishment the victims were recommending. Indeed the only statements regarding sentencing were that the victims did not "think anyone should be able to do something like [the murders at issue] and get away with it" and that "the people who did this could never be rehabilitated." *Booth*, 482 U.S. at 508. No specific recommendations regarding sentencing were made. Thus the facts in *Booth* make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing. In *Payne*, however, the Court characterized *Booth* as prohibiting not only family members' opinions and characterizations, but also recommendations of "the appropriate sentence." *Payne*, 501 U.S. at 830 n.2.

App. 4 n.2.

The victim impact statement at issue in *Booth* contained two types of victim information: "First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." 482 U.S. at 502. The jury

was not presented with any victim recommendation for or characterization of the appropriate sentence. There were passing statements from the victims' son that he "doesn't think anyone should be able to do something like that and get away with it" and from the victims' daughter that "she doesn't want them to be able to do this again or put another family through this," *id.* at 508, which the Court rightly described as characterizations of the crimes and the defendant.

That *Booth* did not consider a victim sentencing recommendation is underscored by the history of *Ohio* v. *Huertas*, 498 U.S. 336 (1991). In reversing a death sentence because the jury considered a victim's sentencing recommendation, the Ohio Supreme Court stated that "the type of evidence given by the victim's family in this case goes beyond that considered in *Booth* and *Gathers*. Here, a family member offered his opinion on what the appropriate sentence would be for the defendant." *State* v. *Huertas*, 553 N.E.2d 1058, 1064 (Ohio 1990). This Court granted certiorari, 498 U.S. 807 (1991), but dismissed the petition as improvidently granted, 498 U.S. 336 (1991), apparently because the victim sentencing recommendation could be excluded independently under state evidentiary rules.

Later that Term, the Court in *Payne* overruled *Booth* with respect to the first category of victim impact information and did not have occasion to consider the second category. In reserving the latter question, however, the Court for reasons unknown described the second category as including not only "family members' opinions and characterizations of the crimes and the defendant," *Booth*, 482 U.S. at 502, but also "family members' characterizations and opinions about the crime, the defendant, and *the appropriate sentence*," *Payne*, 501 U.S. at 830 n.2 (emphasis

added). *Payne* thus ascribed to *Booth* a category of victim information that was not present in that case.

This apparently erroneous, or at least overly expansive, characterization of the victim information at issue in *Booth* is the center of the current controversy. The Court's mischaracterization not only reserves for later consideration the question presented in this petition, but also implicitly and anomalously preserves a rule – a *per se* ban on victim sentencing recommendations – that did not exist in prior law. This anomaly is the crux of the conflict in the lower courts.

B. Only this Court Can Resolve the Clear Conflict on Whether the Eighth Amendment Bars Victim Sentencing Recommendations in a Capital Case.

Because this Court's opinions in *Booth* and *Payne* are the source and center of this controversy, only this Court can settle the dispute. The lower courts fundamentally disagree whether *Booth* erected a *per se* bar against victim sentencing recommendations in capital cases and whether any such bar survives *Payne*. The conflict, in essence, is one over the baseline Eighth Amendment rule before and after the dictum in *Payne* that reserved judgment on the question presented in this petition.

The Court of Appeals for the Tenth Circuit has held that "the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid." *Hain* v. *Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002) (quoting *Payne*, 501

U.S. at 830 n.2). See also *Hooper* v. *Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (same). The Tenth Circuit did not question the assertion that *Booth* considered sentencing recommendations and thus assumed that the baseline rule, which it thought *Payne* left intact, was that the Eighth Amendment erected a *per se* bar against victim sentencing recommendations. Courts that have reached similar conclusions include the Courts of Appeals for the Eighth Circuit,[6] the Fifth Circuit,[7] and the Fourth Circuit[8] in dictum and the highest courts of Alabama,[9] Maryland,[10] New Jersey,[11] Ohio,[12] Tennessee,[13] Virginia,[14] and Washington.[15]

In its opinion below, the Arizona Supreme Court questioned the assertion that *Booth* had erected a *per se* bar against sentencing recommendations but ultimately agreed with the Tenth Circuit. Delving further into the

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[6] See *Parker* v. *Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000) (dictum).

[7] See *Woods* v. *Johnson*, 75 F.3d 1017, 1037-38 (5th Cir. 1996) (dictum).

[8] See *Ivey* v. *Catoe*, 36 Fed. Appx. 718, 725-26 (4th Cir.), *cert. denied*, 123 S. Ct. 420 (2002) (dictum).

[9] See *Ex Parte McWilliams*, 640 So.2d 1015, 1017 (Ala. 1993).

[10] See *Ware* v. *State*, 759 A.2d 764, 783-86 (Md.), *cert. denied*, 531 U.S. 1115 (2000).

[11] See *State* v. *Koskovich*, 776 A.2d 144, 177 (N.J. 2001).

[12] See *State* v. *Fautenberry*, 650 N.E.2d 878, 882 (Ohio), *cert. denied*, 516 U.S. 996 (1995).

[13] See *State* v. *Middlebrooks*, 995 S.W.2d 550, 558 (Tenn. 1999).

[14] See *Beck* v. *Commonwealth*, 484 S.E.2d 898, 906 (Va. 1997).

[15] See *State* v. *Pirtle*, 904 P.2d 245, 269 (Wash. 1995), *cert. denied*, 518 U.S. 1026 (1996).

history of *Booth* and *Payne*, the court correctly noted that "the facts in *Booth* make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing." App. 8 n.4. However, the court "defer[red] to the Court's interpretation of its own case," App. 8, n.4, and held that "*Payne* did not overrule and indeed left intact that portion of *Booth* which the Court itself has characterized as prohibiting victims from recommending a sentence in a capital case." App. 8.

By contrast, the Oklahoma Court of Criminal Appeals, the State's criminal court of last resort, has definitively reached the opposite conclusion and consistently permits victims in capital cases to recommend the appropriate sentence. "In at least three decisions, this Court has taken the position that *Payne* appears to have overruled *Booth* with respect to the issue of whether or not victim impact statements could include characterizations of the defendant, the crime, and opinions in regard to sentencing." *Murphy* v. *State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 123 S. Ct. 1795 (2003), (citing *Turrentine* v. *State*, 965 P.2d 955, 980 (Okla. Crim. App. 1997), *cert. denied*, 525 U.S. 1057 (1998); *Ledbetter* v. *State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997); *Conover* v. *State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997)).

Noting that this Court has denied past petitions presenting the question, and that it has "continued to approve of such evidence in other capital cases," the Oklahoma Court of Criminal Appeals reaffirmed its consistent rejection of the argument that the court's "interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Murphy* v. *State*, 47 P.3d at 885 (citing *Young* v. *State*, 12 P.3d 20 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1055 (2001)

and *Welch* v. *State*, 2 P.3d 356 (Okla. Crim. App. 2000), *cert. denied*, 531 U.S. 1056 (2000)).

The Oklahoma Court of Criminal Appeals, of course, misstated the import of this Court's denials of petitions for certiorari, see *Maryland* v. *Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (Frankfurter, J., respecting denial of the petition for certiorari), especially because each of the previous petitions posed a vehicle problem to this Court's consideration of the question presented. In two cases, the petitioner did not object and their arguments were dismissed on plain error review. See *Murphy*, 47 P.3d at 885; *Welch*, 2 P.3d at 373. The defendant in another case failed to elicit the victim's opinion on the appropriate sentence and unsuccessfully sought to reopen the proceedings to consider her recommendation of life. The appellate court held that the victim recommendation would have been admissible, but that the trial court did not abuse its discretion in denying the motion to reopen. *Young*, 12 P.3d at 43. In *Turrentine*, the Oklahoma Court of Criminal Appeals held that any constitutional error was harmless beyond a reasonable doubt. 965 P.2d at 982. Likewise, although the Tenth Circuit has held twice that the Oklahoma courts erroneously permitted victim opinions on the appropriate sentence, it further held in each case that "this constitutional error was harmless because it did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Hooper* v. *Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 637 (1993)); see also *Hain* v. *Gibson*, 287 F.3d 1224, 1239-40 (10th Cir. 2002).

This case presents no such barriers to the Court's consideration of the question presented and, by contrast, is the ideal vehicle for the Court to address the panoply of

questions relevant to the conflict and confusion in the lower courts. The court below acknowledged that Arizona law afforded Petitioner the right to offer an opinion on the appropriate sentence, but thought that the Eighth Amendment bars such opinions. Petitioner would have recommended life; the State opposed such a recommendation; and the criminal defendant supported Petitioner's right to recommend life but argued that a recommendation of death would violate the Eighth Amendment. The jury sentenced the defendant to death without having heard Petitioner's plea for life. The Court therefore has the unique opportunity to consider whether the Constitution bars all victim recommendations, only those that favor death, or only those that are unduly inflammatory or prejudicial.

II. Whether the Eighth Amendment Bars Admission of Victim Sentencing Recommendations is a Question of National Importance.

The question presented is a matter of national importance. The decision below casts constitutional doubt on the laws and constitutions of forty States that afford victims the right to participate in sentencing proceedings. "The constitutions or statutes of forty States either explicitly or implicitly grant victims the right to give recommendations at sentencing. Twenty-three of these States grant victims the constitutional right to address the sentencing authority. Seventeen States do not have the right in their constitutions but grant the right by statute."[16] The Federal Rules

[16] See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 286-87 (2003); see also *id.* at 299-305 (collecting authorities).

likewise entitle victims of violent crime to "make a statement or present any information in relation to the sentence." Fed. R. Crim. Proc. 32(i)(4)(B).

This democratic trend in favor of victim participation in sentencing proceedings underscores the national importance of the question presented – a question that is jurisprudentially intertwined with the popular will. As Justice O'Connor has observed,

> The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed 'cruel and unusual.' Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most States have enacted legislation enabling judges and juries to consider victim impact evidence.

Payne, 501 U.S. at 831 (O'Connor, J., concurring) (internal quotations omitted). The Court in this case can ensure that whether victims may recommend the appropriate sentence remains "a question to be decided through the democratic processes of a free people," *Booth*, 482 U.S. at 520 (Scalia, J., dissenting).

Although the democratic processes have resulted in strong protections for victim participation in sentencing proceedings, "[n]one of these State or Federal laws are able to match the constitutionally protected rights of

offenders."[17] Given this structural imbalance, successive Congresses have considered, and different Administrations have supported, constitutional amendments to "keep the balance true"[18] between the rights of victims and criminal defendants. The current bipartisan proposal, Senate Joint Resolution 1, guarantees victims the right to participate in sentencing proceedings and is supported by the President and Attorney General of the United States and forty-two State attorneys general. By resolving the conflict below about the extent to which States may afford crime victims the right to make sentencing recommendations, this Court would provide the legal clarity necessary for the political branches and the States to consider more fully the decision to amend the U.S. Constitution and the content of any such amendment.

III. The Court Below Erred in Holding that It Constitutes Cruel and Unusual Punishment for the Husband of a Murdered Woman to Seek Leniency for His Wife's Killer.

This Court can resolve the conflict in the lower courts and eliminate the confusion in the law with a straightforward clarification: The holding in *Payne* v. *Tennessee* that "the Eighth Amendment erects no *per se* bar," 501 U.S. at 827, against victim statements to the jury extends to statements about the appropriate sentence. "There is no

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[17] *Federal Victims' Rights Amendment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong., 2d Sess. 39 (2002) (statement of Roberta Roper, National Victims' Constitutional Amendment Network).

[18] *Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934).

reason to treat such evidence differently than other relevant evidence is treated." *Ibid.* Any risk that such recommendation would be unduly prejudicial is addressed by the evidentiary rules, under which "courts routinely exclude evidence that is unduly inflammatory," *id.* at 831 (O'Connor, J., concurring), or by the Due Process Clause, in cases where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair." *Ibid.*

A. The Eighth Amendment Does Not Erect a *Per Se* Bar Against Victim Sentencing Recommendations in a Capital Case.

Nothing in the text or history of the Eighth Amendment supports the conclusion reached by the Arizona Supreme Court that "the Eighth Amendment to the United States Constitution prohibits a victim from making a sentencing recommendation to the jury in a capital case." App. 4.

The cornerstone of this Court's decision to overrule *Booth* and *Gathers* was fairness – fairness to the victim and fairness in the administration of justice. The *per se* bar to victim impact statements erected by *Booth* "unfairly weighted the scales in a capital trial." *Payne*, 501 U.S. at 822. In *Payne*, this Court noted that a litany of persons – the defendant's girlfriend and parents, and even a psychologist – testified favorably about the defendant during sentencing, *id.* at 825-26, while very little was allowed to be said about the victim. *Id.* at 826. This Court recognized the manifest unfairness of the *per* se bar erected by Booth and quoted the Tennessee Supreme Court approvingly:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

Id. at 826 (quoting *State* v. *Payne*, 791 S.W.2d 10, 19 (Tenn. 1990)).

Despite this Court's decision in *Payne*, fairness for victims remains elusive. During the penalty phase of a capital trial, Arizona law specifically affords the defendant a right of allocution. See Ariz. R. Crim. Proc. 19.1(d)(5). This right of allocution permits not only the defendant, but also his family, to recommend a sentence to the jury. See *State* v. *Gonzales*, 892 P.2d 838, 851 (Ariz. 1995) (permitting statement from family members that they "would continue a relationship with [defendant] if he were sentenced to prison instead of death").[19] After *Payne*, crime victims in Arizona enjoy a constitutional and statutory right of allocution, similar to that of the defendant.[20] Similar, but neither coterminous nor comparable, because

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[19] See also Wayne A. Logan, *Opining On Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C.L. REV. 517, 545-46 (2000) ("[C]ourts regularly allow 'pleas for mercy' by defense witnesses. Allocution, when the capital defendant himself addresses the sentencing authority on the question of death, inevitably bears a close similarity as well.") (citations omitted).

[20] A victim at times may be called to make a statement as a witness. In other cases, as in this one, the victim has a constitutional or statutory right of allocution and addresses the sentencing authority as a participant in the proceedings.

the court below held that the Eighth Amendment circumscribed that right to preclude any victim opinion on the appropriate sentence.

This Court has long recognized that the Eighth Amendment's prohibition on cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems* v. *United States*, 217 U.S. 349, 378 (1910). Further, the Eighth Amendment's prohibition against cruel and unusual punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). If there is one clear characteristic of the "evolving standards of decency that mark the progress of a maturing society," it is the recognition that victims, like defendants, should have a voice at sentencing.

Petitioner's research has not identified any decision holding that the Constitution prohibits victims from recommending the appropriate sentence in non-capital cases.[21] Indeed, death is different, but no salient differences distinguish capital and non-capital cases when it comes to the right of allocution. "Ultimately, the argument for unconstitutionality is based on the possibility of prejudice to the jury; yet empirical evidence directly contradicts

[21] Beloof, *supra*, at 289 n.51 ("Every state ruling on the constitutionality of victim recommendations in noncapital cases has held that trial court judges can hear all three types of impact evidence, including sentencing recommendations that are in the public interest.") (collecting authorities).

the assumption that jurors are readily influenced, much less prejudiced, by participant recommendations."[22]

Absent a victim sentencing recommendation, having heard a statement "about the victim and the impact of the murder on the victim's family,"[23] a capital jury is left to speculate what the victim might think about the appropriate sentence. Such speculation invites error, as in this case, where Petitioner spoke at length about his love for his wife and the terrible loss from her murder but was barred from saying that, notwithstanding the loss and his general support for capital punishment, this was not an appropriate case for the death penalty. The jury's speculation, fueled by the victim's silence, leads to the very "arbitrariness" condemned by this Court.[24]

B. Any Risk of Prejudice Is Addressed by Evidentiary Prohibitions Against Inflammatory Testimony and the Due Process Guarantee of Fundamental Fairness.

Any risk that a victim's sentencing recommendation to a capital jury would be unduly prejudicial is addressed by the evidentiary rules, under which "courts routinely exclude evidence that is unduly inflammatory," *id.* at 831 (O'Connor, J., concurring), or by the Due Process Clause, in cases where "a witness' testimony or a prosecutor's

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[22] Beloof, *supra*, at 291 (citing Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 340 (2003)).

[23] *Payne*, 501 U.S. at 827.

[24] *Furman* v. *Georgia*, 408 U.S. 238 (1972).

remark so infects the sentencing proceeding as to render it fundamentally unfair." *Ibid.*

A *per se* bar to all victim capital sentencing recommendations is unnecessarily broad given the ability of the trial court to properly focus the jury's deliberations and maintain courtroom decorum through the use of instructions. Courts routinely correct, through instructions, inappropriate emotional displays in the courtroom, and victim opinions on the proper sentence can be similarly handled. Excessive emotions can also be exhibited by the defendant and his family when they opine on the sentence or by the victims when they talk about the impact of the crime. No justification exists to single out victim opinions about the appropriate sentence for a *per se* bar.

The Oklahoma Court of Criminal Appeals has recognized the illogic and unfairness of singling out victim sentencing opinions for *per se* treatment and allows "a simple statement of the recommended sentence without amplification."[25] In this case, Petitioner told the jury about his wife Nila and their life together. He told the jury about her murder and the pain it caused. Permitting him to take just one more step in the path toward closure and conclude his statement with a simple request that the jury spare the defendant's life would in no conceivable way constitute cruel and unusual punishment.

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[25] *Conover* v. *State*, 933 P.2d 904, 921 (Okla. Crim. App. 1997).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 18, 2003

68 P.3d 412

SUPREME COURT OF ARIZONA

DUANE LYNN, Petitioner, v. HON. PETER C. REINSTEIN, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge, RICHARD GLASSEL; STATE OF ARIZONA, Real Parties in Interest.	Arizona Supreme Court No. CV-02-0435-PR Court of Appeals Division One No. 1 CA-SA 02-0309 Maricopa County Superior Court No. CR 2000-006872 **OPINION** (Filed May 19, 2003)

Special Action from the Superior Court in Maricopa County
The Honorable Peter C. Reinstein, Judge

AFFIRMED

Court of Appeals, Division One
Decision Order, filed December 23, 2002

AFFIRMED

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BERCH, Justice

¶1 Richard Glassel opened fire at a homeowners' association meeting, killing Nila Lynn, Petitioner Duane Lynn's wife. In the ensuing first degree murder case against Glassel, Petitioner asserted a right under Arizona's Victims' Bill of Rights, Ariz. Const. art. 2, § 2.1, to tell the jurors what sentence he thought they should impose on Glassel. He seeks review of the rulings of the trial court and court of appeals that he may not state his opinion on that subject.

BACKGROUND

¶2 Richard Glassel was convicted of murdering Petitioner's wife of nearly fifty years. Petitioner asked the court to allow him, during the sentencing phase of Glassel's trial, to tell the jury not only about his wife's character and the loss caused by Glassel's acts, but also to express his opinion regarding the appropriate sentence to be imposed. The motion stated Petitioner's intent to recommend that Glassel receive a sentence of life in prison. Glassel did not object to Petitioner's request to recommend leniency, but the State did.

¶3 The trial judge allowed the victim impact statements,[1] but denied the motion as to sentencing recommendations, concluding that a victim's sentencing recommendations are not relevant to either the mitigating or aggravating factors involved in capital sentencing and that precluding Petitioner's opinion on sentencing did not violate his rights as a crime victim.

¶4 The court of appeals accepted jurisdiction of Petitioner's special action, but denied relief. *Lynn v. Reinstein (Glassel)*, 1 CA-SA 02-0309, 4 (Ariz. App. Dec. 23, 2002) (dec. order). The court observed that nearly all states prohibit victims from offering sentencing recommendations in capital cases. *Id.* at 2. The court also found Arizona case law clear that "sentencing recommendations offered by a deceased's survivors have no relevance in a capital case." *Id.* at 3 (quoting *State v. Bocharski,* 200 Ariz. 50, 62, ¶ 64, 22 P.3d 43, 55 (2001)).

¶5 Although Glassel has already been sentenced, we accepted review because the question whether a victim in a capital case may express an opinion as to what sentence the jury should impose may arise in future cases. *See* Ariz. Const. art. 6, § 5(3) (granting authority to review cases); Ariz. R.P. Spec. Act. 8(b); ARCAP 23. Following binding

[1] Petitioner does not claim that he was not allowed to provide information regarding his wife or the impact of the crime on his life. While the record in this special action is not developed on this point, we presume that Petitioner was permitted to give a victim impact statement, which, by statute, may include "information about the murdered person and the impact of the murder on the victim and the other family members." Ariz. Rev. Stat. ("A.R.S.") § 13-703.01(Q) (Supp. 2002). We therefore assume that, at the appropriate time, Petitioner was allowed to present such information.

precedent from the United States Supreme Court, we hold that the Eighth Amendment to the United States Constitution prohibits a victim from making a sentencing recommendation to the jury in a capital case.[2]

DISCUSSION

¶6 The Arizona Victims' Bill of Rights "protect[s] victims' rights to justice and due process." Ariz. Const. art. 2, § 2.1(A). As one whose spouse was murdered, Petitioner qualifies as a victim of a crime. *See id.* § 2.1(C) (including the spouse of a person against whom a crime has been committed as a "victim"); Ariz. Rev. Stat. ("A.R.S.") § 13-703.01(R)(2) (Supp. 2002) (same). As such, Petitioner is entitled by the Arizona Victims' Bill of Rights to "be heard at any proceeding involving . . . sentencing." Ariz. Const. art. 2, § 2.1(A)(4); *see also* A.R.S. § 13-4426(A), (B) (2001) (affording victims the right to "address the court" regarding "opinions that concern . . . the sentence . . . at any aggravation, mitigation, presentencing, or sentencing

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[2] *See* U.S. Const. art. VI, cl. 2; *accord State v. Ring*, ___ Ariz. ___, ¶ 61, 65 P.3d 915, 938 (2003) ("We cannot ignore a Supreme Court decision interpreting federal law unless the Court expressly overrules or casts cognizable doubt on that decision."). Because we hold that the Eighth Amendment prohibits a victim from making a sentencing recommendation to the jury in a capital case, we do not discuss whether Arizona law would permit such a recommendation. Although we usually decide issues of statutory construction before delving into constitutional issues, the clarity of the Supreme Court's Eighth Amendment analysis on this point renders the additional analysis unnecessary. *See R.L. Augustine Constr. Co. v. Peoria Unified Sch. Dist. No. 11*, 188 Ariz. 368, 370, 936 P.2d 554, 556 (1997) (stating that this court "will not reach a constitutional question if a case can be fairly decided on nonconstitutional grounds").

proceeding"). At issue in this case is whether that right encompasses a right to opine regarding the sentence itself, or whether the right is limited to offering testimony regarding the victim and the impact of the crime upon the victim and the victim's family.

¶7 The rights granted to victims are to "be liberally construed." A.R.S. § 13-4418. Petitioner contends that a liberal construction of the Arizona Constitution and victims' rights statutes compels the conclusion that a victim may recommend to the jury in a capital sentencing proceeding the sentence that the victim believes the jury should impose.[3] He reasons that because victims' opinions on sentencing are admissible in non-capital cases, they should also be allowed in capital cases, for "[n]othing . . . suggests that, as the severity of the crime escalates, the victim's rights should diminish."

¶8 To the contrary, however, Supreme Court death penalty jurisprudence has recognized that "death is a 'punishment different from all other sanctions,' and that therefore the considerations that inform the sentencing decision may be different from those that" apply to other punishments. *Booth v. Maryland,* 482 U.S. 496, 509 n.12, 107 S. Ct. 2529, 2536 n.12 (1987) (internal citation omitted), *overruled in part by Payne v. Tennessee,* 501 U.S. 808, 111 S. Ct. 2597 (1991). Thus, while states generally enjoy latitude in designing and implementing their criminal justice systems, "the Eighth Amendment imposes special

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[3] During the course of the special action proceedings, Petitioner apparently changed his recommendation from life in prison to death. Glassel then objected to allowing Petitioner to make a recommendation.

limitations" upon the process for imposing the death penalty. *Payne,* 501 U.S. at 824, 111 S. Ct. at 2607-08. Consequently, Arizona may not permit victims to recommend sentences in capital cases if the Eighth Amendment prohibits such recommendations.

¶9 In 1987, the Supreme Court examined the admissibility in a capital trial of the victims' statements regarding the impact of the defendant's crimes. *See Booth,* 482 U.S. at 496, 107 S. Ct. at 2529. The victims' statements in *Booth* fell into three categories: (1) statements regarding the deceased's personal characteristics; (2) statements regarding the impact of the crime on the victims' family; and (3) the victims' "family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Payne,* 501 U.S. at 830 n.2, 111 S. Ct. at 2611 n.2 (characterizing the victim impact evidence in *Booth*). The Court observed that sentencing decisions must be based only "on 'the character of the individual [defendant] and the circumstances of the crime.'" *Booth,* 482 U.S. at 502, 107 S. Ct. at 2532 (quoting *Zant v. Stephens,* 462 U.S. 862, 879, 103 S. Ct. 2733, 2743 (1983)). The Court therefore carefully scrutinized a state statute *requiring* the consideration of information regarding the victim, in order to minimize "the risk that a death sentence will be based on considerations that are 'constitutionally impermissible or totally irrelevant to the sentencing process.'" *Id.* at 502, 107 S. Ct. at 2533 (quoting *Zant,* 462 U.S. at 885, 103 S. Ct. at 2747). The Court determined that victims' opinions regarding the crime and appropriate sentence "can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." *Id.* at 508, 107 S. Ct. at 2536. In a sharply divided opinion, the

Court held that "the introduction of a [victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment," and therefore held unconstitutional a state statute requiring the consideration of such information. *Id.* at 509, 107 S. Ct. at 2536.

¶10 The four-member dissent in *Booth* focused on society's growing concern for the rights of victims of crime, a concern that has culminated in a movement to address "the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's moral guilt, but also the amount of harm he has caused to innocent members of society." *Id.* at 520, 107 S. Ct. at 2542 (Scalia, J., dissenting). The majority's limitation of relevant evidence regarding a defendant's blameworthiness also troubled the Court's dissenting members. Justice White observed that the harm caused by a defendant's criminal conduct should be relevant to sentencing and that a murderer should be held "accountable not only for his internal disposition in committing the crime but also for the full extent of the harm he caused." *Id.* at 516, 107 S. Ct. at 2540 (White, J., dissenting).

¶11 Just four years later, the Court overruled aspects of *Booth's* broad prohibition on the presentation of victim impact evidence. *Payne,* 501 U.S. at 827-30 & n.7, 111 S. Ct. at 2609-11 & n.7. While not ruling all victim statements admissible, the Court in *Payne* determined that a witness's testimony regarding the effect of the defendant's crime may be relevant to sentencing, and it removed the per se bar to the admission of such evidence that *Booth* had erected. *Id.* at 825-27, 111 S. Ct. at 2608-09.

¶12 Petitioner asserts that *Payne* overruled all barriers to the admissibility of victim opinion statements. We think

Petitioner "moves too quickly over the terrain we must cover." *Caterpillar, Inc. v. Lewis,* 519 U.S. 61, 73, 117 S. Ct. 467, 475 (1996). The Court's opinions in *Payne* are carefully circumscribed. The majority opinion notes that the case did not involve victim statements regarding the appropriate sentence to be imposed. *Payne,* 501 U.S. at 830 n.2, 111 S. Ct. at 2611 n.2. Justice O'Connor's concurring opinion, in which Justices White and Kennedy joined, echoes this limitation, *id.* at 833, 111 S. Ct. at 2612-13 (O'Connor, J., concurring), as does Justice Souter's concurring opinion, *id.* at 835 n.1, 111 S. Ct. at 2614 n.1 (Souter, J., concurring) ("This case presents no challenge to the Court's holding in *Booth v. Maryland* that a sentencing authority should not receive a third category of information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence."). Thus *Payne* did not overrule and indeed left intact that portion of *Booth* that the Court itself has characterized as prohibiting victims from recommending a sentence in a capital case.[4] *Id.* at 830 n.2, 111 S. Ct. at 2611 n.2.

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[4] The victims' statements in *Booth* only indirectly hinted at the punishment the victims were recommending. Indeed the only statements regarding sentencing were that the victims did not "think anyone should be able to do something like [the murders at issue] and get away with it" and that "the people who did this could [n]ever be rehabilitated." *Booth,* 482 U.S. at 508, 107 S. Ct. at 2535-36. No specific recommendations regarding sentencing were made. Thus the facts in *Booth* make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing. In *Payne,* however, the Court characterized *Booth* as prohibiting not only family members' opinions and characterizations, but also recommendations of "the appropriate sentence." *Payne,* 501 U.S. at 830 n.2, 111 S. Ct. at 2611 n.2. We defer to the Court's interpretation of its own case.

¶13 The Court's opinion in *Payne* recognized that the characteristics of the victim and the impact of the crime on the victim's family may be relevant in determining blameworthiness and culpability and in assessing the harm caused by the defendant's conduct and, therefore, such evidence is relevant in determining whether the death penalty should be imposed. *See id.* at 825-27, 111 S. Ct. at 2608-09. The Court concluded that, in determining a "defendant's moral culpability and blameworthiness," states may allow jurors to hear evidence of the specific harm the defendant has caused. *Id.* at 825, 111 S. Ct. at 2608. The Court reasoned that because victim impact evidence serves "entirely legitimate purposes," *id.*, "[t]here is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* at 827, 111 S. Ct. at 2609. But while *Payne* overruled *Booth's* per se ban on victims' statements regarding the victim and the impact of the crime on the victim's family, it did not find victims' sentencing opinions relevant.[5] *Id.* at 827, 830 & n.2, 111 S. Ct. at 2609, 2611 & n.2; *accord State v. Sansing,* 200 Ariz. 347, 358, ¶¶ 35-37, 26 P.3d 1118, 1129 (2001) (affirming the trial court's refusal to consider the victim's ten-year-old daughter's request for mercy as a mitigating

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[5] The "relevance" referred to in *Booth* differs from that set forth in the state rules of evidence. It is a constitutional concept that considers whether information that may bear upon the capital sentencing decision creates a constitutionally unacceptable risk that jurors may impose a death sentence based upon impermissible arbitrary and emotional factors. *Booth,* 482 U.S. at 504-05 & n.7, 107 S. Ct. at 2533-34 & n.7.; *cf. Eddings v. Oklahoma,* 455 U.S. 104, 110, 113-14, 102 S. Ct. 869, 874, 876-77 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604-05, 98 S. Ct. 2954, 2964-65 (1978) (discussing Eighth Amendment constitutional relevance of evidence bearing on mitigation factors in capital cases).

circumstance because the request for mercy was not relevant to mitigation), *vacated on other grounds by* 122 S. Ct. 2654 (2002). Indeed, the Supreme Court carefully limited its opinion in *Payne,* 501 U.S. at 830 n.2, 111 S. Ct. at 2611 n.2, and did not disturb its earlier determination that victim sentencing opinions were not only irrelevant in capital sentencing proceedings, but might well be prejudicial. *See Booth,* 482 U.S. at 508-09, 107 S. Ct. at 2535-36.

¶14 Petitioner relies on cases from Oklahoma in support of his position that victims' opinions regarding sentencing should be allowed in capital cases. These cases are premised on an Oklahoma statute that purports to allow victims to suggest to jurors the sentence. *See, e.g., Ledbetter v. State,* 933 P.2d 880 (Okla. Crim. App. 1997) (applying Okla. Stat. tit. 22, § 984(1)). Yet even the Oklahoma courts recognize that such "evidence may not pass scrutiny by the United States Supreme Court" in light of its decision in *Payne,* 501 U.S. at 830, 111 S. Ct. at 2611. *State v. Hain,* 919 P.2d 1130, 1144 n.3 (Okla. Crim. App. 1996). Moreover, we note that the Tenth Circuit, sitting on habeas corpus review in *Hain,* recently held that the Oklahoma court violated the defendant's Eighth Amendment rights by allowing the victims in that case to offer opinions regarding the appropriate sentence. *Hain v. Gibson,* 287 F.3d 1224, 1238-39 (10th Cir. 2002). Thus, we are unpersuaded to follow the reasoning of the Oklahoma Court of Criminal Appeals in this area.

¶15 Finally, Petitioner has urged that a victim has status as a "limited party" in a capital case and this status entitles the victim to opine regarding the sentence to be imposed. Petitioner cites no authority in support of his asserted status, and we find none. No statute or rule confers party status upon a victim, and the one case

addressing the point held that a victim is not an aggrieved party for purposes of filing a petition seeking review of a court's grant of post-conviction relief. *See State v. Lamberton,* 183 Ariz. 47, 899 P.2d 939 (1995). In *Lamberton,* this court acknowledged a victim's standing "only to 'seek an order or to bring a special action' to assert the enumerated rights guaranteed by the [Victims' Bill of Rights]." *Id.* at 50, 899 P.2d at 942 (quoting A.R.S. § 13-4437). Moreover, Petitioner conceded at oral argument that even a party may not opine regarding irrelevant facts or unfairly prejudicial issues. We thus conclude that victims are not parties to a defendant's criminal case.

¶16 Victims deserve to be heard and to receive fair treatment in the criminal justice system. Indeed, the Supreme Court recognized as much when it reaffirmed Justice Cardozo's statement that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Payne,* 501 U.S. at 827, 111 S. Ct. at 2609 (quoting *Snyder v. Massachusetts,* 291 U.S. 97, 122, 54 S. Ct. 330, 338 (1934)). The Court thus removed the per se bar to the admission of victims' statements regarding the effect of a crime upon their lives, requiring only that the states determine the victim impact statements "relevan[ce] to the jury's decision as to whether or not the death penalty should be imposed." *Id.* It did not, however, remove the bar precluding sentencing recommendations.

¶17 While the Court has recognized the victims' desire to tell jurors of the effect of a defendant's crime upon their lives, the victims' right to speak is not unlimited. Statements relevant to the harm caused by the defendant's criminal acts are no longer barred by the Eighth Amendment. But statements regarding sentencing exceed those

bounds and violate the Eighth Amendment, and therefore are prohibited. Victims' recommendations to the jury regarding the appropriate sentence a capital defendant should receive are not constitutionally relevant to the harm caused by the defendant's criminal acts or to the defendant's blameworthiness or culpability. *See State v. Mann,* 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997); *State v. Williams,* 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995). Petitioner's request to opine regarding sentencing, therefore, is denied.

CONCLUSION

¶18 The rulings of the trial court and the court of appeals are affirmed.

Rebecca White Berch, Justice

CONCURRING:

Charles E. Jones, Chief Justice

Ruth V. McGregor, Vice Chief Justice

Michael D. Ryan, Justice

A. John Pelander, Judge*

* Pursuant to Arizona Constitution, article 6, section 3, the Honorable A. John Pelander, Judge of the Arizona Court of Appeals, Division 2, was designated to sit on this case.

SUPREME COURT OF ARIZONA

DUANE LYNN, Petitioner, v. HON. PETER C. REINSTEIN, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of Maricopa, Respondent Judge, RICHARD GLASSEL; STATE OF ARIZONA, Real Party in Interest.	) Arizona Supreme Court) No. CV-02-0435-PR)) Court of Appeals) Division One) No. 1 CA-SA 02-0309)) Maricopa County) Superior Court) No. CR 2000-006872)) **MANDATE**

TO: Maricopa County Superior Court, Arizona, in relation to Cause No. CR 2000-006872

The above entitled and numbered cause was presented in your Court and was brought before the court of Appeals Division One, No. 1 CA-SA 02-0309, in the manner prescribed by law. That Court filed its Decision Order on the 23rd day of December, 2002. A Petition for Review was granted by this Court on the 7th day of January, 2003.

This Court, having considered the matter, filed its Opinion on the 19th day of May, 2003, affirming the rulings of the trial court and the Court of Appeals entered in the above entitled cause.

The time for filing a Motion for Reconsideration has expired and no motion was filed.

NOW, THEREFORE, YOU ARE COMMANDED that if further proceedings are required, such proceedings be held in this matter as may be appropriate and consistent with this Court's Opinion (copy attached to this original Mandate).

IN WITNESS WHEREOF, I hereunto set my hand and affix the seal of the Supreme Court of the State of Arizona this 24th day of June, 2003.

/s/ Noel K. Dessaint
NOEL K. DESSAINT, Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DUANE LYNN, Petitioner, v. THE HONORABLE PETER C. REINSTEIN, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the county of MARICOPA, Respondent Judge, RICHARD GLASSEL; STATE OF ARIZONA, Real Parties in Interest.	) 1 CA-SA 02-0309) DEPARTMENT E) MARICOPA County Superior Court) No. CR 2000-06872) DECISION ORDER) (Filed Dec. 23, 2002)

This special action was heard at oral argument this 23rd day of December, 2002, before Presiding Judge Edward C. Voss and Judges Patrick Irvine and Ann A. Scott Timmer, and the matter was taken under advisement. After consideration,

IT IS ORDERED that the court of appeals, in the exercise of its discretion, accepts jurisdiction in this special action, but denies relief.

The question before the court is whether the victim in a capital case may offer his opinion to the jury as to the imposition of the death penalty. The trial court, relying on Arizona precedent, denied the victim's right to offer such an opinion, finding it relevant neither to the statutory aggravating or mitigating circumstances.

Special action jurisdiction is appropriate in this case. *See Blake v. Schwartz*, 202 Ariz. 120, 122, ¶ 7, 42 P.3d 6, 8 (App. 2002) ("where an issue is one of first impression of a purely legal question, is of statewide importance, and is likely to arise again" special action jurisdiction is appropriate).

In 1987, the United States Supreme Court in *Booth v. Maryland*, 482 U.S. 496, 508 (1987) held the admission of a victim impact statement in a capital case violated the defendant's Eighth Amendment rights, was irrelevant, and created an unacceptable risk that the jury would arbitrarily and capriciously impose a death sentence. *Booth* also found that admission of a victim's "emotionally charged opinions as to what conclusions a jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases." *Id.* at 508-509. In 1991, in *Payne v. Tennessee*, 501 U.S. 808 (1991), although the Supreme Court revisited the first *Booth* issue and found no Eighth Amendment bar to the admission of victim impact statements, the decision did not address whether a victim could express an opinion on the available penalties.

Most cases in other jurisdictions that have addressed this issue have also found victims' sentencing opinions inadmissible. *See e.g. Robison v. Maynard*, 829 F.2d 1501, 1504-05 (10th cir. 1992), *overruled on other grounds by Romano v. Gibson*, 239 F.3d 1156 (10th Cir. 2001) (holding Supreme Court cases allowing the admission of "any relevant mitigating evidence" in capital cases did not require court to allow victim to testify in favor of a life sentence for defendant); *Greene v. State*,

37 S.W.3d 579, 583-86 (Ark. 2001) (wife's recommendation for life sentence following murder of her husband was neither victim impact evidence nor proper mitigation evidence).

Although Arizona has not addressed this matter directly in the context of a jury, several cases have held that victim impact evidence is not relevant to either the aggravating or mitigating factors in a capital case. *See e.g. State v. Sansing*, 200 Ariz. 347, 358, 26 P.3d 1118, 1129 (2001); *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997); *State v. Gulbrandson*, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995). In *State v. Bocharski*, our supreme court explained that "sentencing recommendations offered by a deceased's survivors have no relevance in a capital case." 200 Ariz. 50, 62, 22 P.3d 43, 55 (2001) (citations omitted). The *Bocharski* court went on to state that the victim's rights provided by the Arizona Constitution give the victim's family the right to be heard at a capital sentencing but not to proffer irrelevant sentencing recommendations. *Id.* at 63, 22 P.3d at 56.

Moreover, when a victim's family has voiced an irrelevant sentencing opinion, our courts have routinely found that the trial judge did not give the opinion any weight and were able to disregard those irrelevant and inflammatory requests. *See State v. Mann*, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997) (citing *State v. Bolton*, 182 Ariz. 290, 315-16, 896 P.2d 830, 855-56 (1995); *see also Bocharski*, 200 Ariz. at 63, 22 P.3d at 56 (reversing when it appeared trial court may have considered victim's request for death penalty "[a]lthough we normally presume that the trial judge as focused only on relevant sentencing factors"). Obviously, a jury cannot

be afforded the same presumption that it would overlook inflammatory and irrelevant evidence.

Taken together, we believe the above-cited cases compel the trial court's ruling that Petitioner cannot voice his sentencing recommendation to the jury. We do not discern error.

IT IS FURTHER ORDERED denying relief.

DATED this 23rd day of December, 2002.

/s/ Edward Voss
EDWARD C. VOSS,
Presiding Judge, Department E

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/12/2002

HONORABLE PETER C. REINSTEIN

CR 2000-006872

FILED: 11/13/2002

STATE OF ARIZONA

v.

RICHARD J GLASSEL

CATHERINE M HUGHES
BRET A MAIDMAN
DOUGLAS L IRISH
STASY D CLICK

DENNIS C JONES
MARK D TALLAN

VICTIM SERVICES
DIV-CA-CCC

MINUTE ENTRY

The charges against the defendant include two counts of first degree murder alleged to have occurred in 2000. The prosecution seeks the death penalty under the 2002 legislative amendments. The widower of one of the deceaseds, Mr. Duane Lynn, (hereinafter "victim"), moved this Court for a pre-trial determination of whether he may recommend to the jury that it not impose the death sentence. This Court received a written response from the prosecution as well as a written application to appear as amicus curiae. Oral argument was held on October 25th. This Court has also received and considered the victim's posthearing memorandum.

The victim argues that because the 2002 legislation removed language barring a victim's recommendation, his

life recommendation is now permissible and constitutionally required. The defendant argues that he has a constitutional right to present the victim's life recommendation as mitigation. The prosecution argues the victim's life recommendation is not relevant, but if it is admitted, then the prosecution may rebut it with any victim death recommendations.

This Court first addresses the prosecution's claim that the victim's motion should not be considered because the victim is not an "aggrieved party" under State v. Lamberton, 183 Ariz. 47, 899 P.2d 939 (1995). This Court disagrees. In Lamberton, the defendant's post-conviction petition was granted and then both the prosecution and the victim appealed. The Supreme Court held the victim could not pursue her own appeal of the grant of post-conviction relief because the victim was not a party. Lamberton, 183 Ariz. at 49 citing Rule 32.9(c). Although the victim is not a party to this litigation, the victim does have standing here to assert his own constitutional rights. Lamberton, 183 Ariz. at 4950.

Although capital sentencing issues are not ripe, and would not be ripe unless there is a conviction for first-degree murder, this Court believes a pre-trial determination is appropriate. The victim's request is in the nature of a motion in limine that seeks an advance ruling on the admissibility of evidence at the capital sentencing phase. Because the capital sentencing phase, if it occurs, would follow immediately after the guilt phase, and the victim and the parties have disparate views, the issue is best addressed now.

The defense position, expressed in oral argument, was that a victim's life recommendation was allowable but a

victim's death recommendation was not. According to the defense, Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Skipper v. South Carolina, 476 U.S. 1 (1986), mandate the life recommendation, but Booth v. Maryland, 482 U.S. 496 (1987) and Payne v. Tennessee, 501 U.S. 808 (1991) foreclose the death recommendation. This Court disagrees.

Lockett, and its progeny, stand for the proposition that the states may not limit mitigation so as to exclude "any aspect of a defendant's character or record and any of the circumstances of the offense." Lockett, 438 U.S. at 604; Eddings, 455 U.S. at 110; Skipper, 476 U.S. at 4. Lockett also stated: "Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Lockett, 438 U.S. at 605, n. 12. Nothing in Payne expanded the universe of admissible relevant mitigation evidence established by Lockett. Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991).

In response to Lockett, the Arizona Legislature expanded the list of mitigating factors by amending A.R.S. §13-703(G) so that mitigation encompasses any "relevant" factor "including any aspect of the defendant's character, propensities or record and any circumstances of the offense." Laws 1979, Ch. 144, §1. The 1979 amendment effectively made a "catch-all" mitigator encompassing anything mandated by Lockett. State v. Lopez, 175 Ariz. 407, 414-15, 857 P.2d 1261, 1268-69 (1993) cert. denied 511 U.S. 1046 (1994).

A victim's recommendation against the death penalty is not relevant to the mitigating factors in A.R.S. §13-703(G). State v. Sansing, 200 Ariz. 347, 26 P.3d 1118

(2001); State v. Trostle, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997); State v. Schackart, 190 Ariz. 238, 257, 947 P.2d 315 (1997); State v. Williams, 183 Ariz. 368, 385, 904 P.2d 437, 454 (1995). Other courts have construed Lockett or similar "catch-all" mitigation factors in the same manner. See Ware v. State, 360 Md. 650, 759 A.2d 764, 783-86 (2000); State v. Bowman, 349 N.C. 459, 509 S.E.2d 428, 440 (1998); State v. Wright, 323 Or. 8, 913 P.2d 321, 324-27 (1996); State v. Pirtle, 127 Wash.2d 628, 904 P.2d 245, 268-69 (1995); Barbour v. State, 673 So.2d 461, 468-69 (Ala.Ct.Crim.App.1994); Robison v. Maynard, 943 F.2d 1216, 1217 (10th Cir. 1991); Floyd v. State, 569 So.2d 1225, 1230 (Fla.1990).

Furthermore, a victim's recommendation for the death penalty is not relevant to the aggravators found in A.R.S. §13-703(F). State v. Mann, 188 Ariz. 220, 228, 934 P.2d 784, 792 (1997); State v. Jones, 185 Ariz. 471, 490 n.3, 917 P.2d 200, 219 n.3 (1996); State v. Spears, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996); State v. Roscoe, 184 Ariz. 484, 910 P.2d 635 (1996); State v. Gulbrandson, 184 Ariz. 46, 66, 906 P.2d 579, 599 (1995); State v. Bolton, 182 Ariz. 290, 315-16, 896 P.2d 830, 855-56 (1995). A victim's capital sentencing recommendation is not admissible as rebuttal. See State v. Roscoe, 184 Ariz. 484, 502, 910 P.2d 635 (1996). Simply put, "Sentencing recommendations offered by a deceased's survivors have no relevance in a capital case." State v. Bocharski, 200 Ariz. 50, 62, 22 P.3d 43, 55 (2001).

The victim points out that before August 2002, A.R.S. §13703(E) contained the following provision:

The court shall not consider any recommendation made by the victim regarding the sentence to be imposed.

The August 2002 legislation does not have this language. See new A.R.S. §13-703.01(Q). The victim reasons that because the bar has been removed, his recommendation is now permissible.

The absent language has been absent before. This language was not placed in the Arizona statutes until 1999, when it was first added to A.R.S. §13-704 (D). Laws 1999, ch. 104, §1. The mitigating factors have been the same for over 23 years. The Legislature is presumed to be aware of its own statutes and the case law interpreting these statutes. See Wareing v. Falk, 182 Ariz. 495, 500, 897 P.2d 1381, 1386 (App.1995). If the Legislature meant in 2002 to change the long-standing interpretation of its aggravation and mitigation provisions this Court believes it would have explicitly written it into the new statute.

The victim also claims that Article 2, §2.1(A)(4), Arizona Constitution and A.R.S. §13-4426 give him the right to make a capital sentencing recommendation. This Court finds State v. Sansing, 200 Ariz. 347, 26 P.3d 1118 (2001) is on point and dispositive. In Sansing the sentencer rejected the deceased's daughter's recommendation for a life sentence and imposed the death sentence. The Arizona Supreme Court found that the recommendation was not relevant and that precluding the recommendation did not violate the victim's rights. Sansing, 200 Ariz. at 358.

In conclusion, nothing in the 2002 legislation altered the mitigating factors, the aggravating factors, or otherwise made a life or death recommendation of a victim relevant. A victim's capital recommendation, whatever it may be, is not admissible in this case. Precluding a victim's capital recommendation does not violate the

constitutional/statutory rights of a victim to be heard, of the defendant to present mitigation, or of the prosecution to present aggravation or rebuttal evidence.

IT IS ORDERED

1) That the motion of victim Mr. Duane Lynn seeking to present a life recommendation to the jury is denied;

IT IS FURTHER ORDERED

2) That no capital sentencing recommendation of a victim, be it life or death, is admissible at any phase of these proceedings absent further order of this Court;

3) That any party or victim who has a good faith basis to introduce a victim's life or death recommendation shall present his/her arguments to this Court by written motion and, in any event, outside the presence of the jury;

4) That the lawyer for a party who calls a victim to the stand, and the lawyer representing the victim, if the victim is represented, shall advise the victim of these orders;

5) That if a victim has more than one lawyer, then the victim and the lawyers shall confer and one lawyer shall be designated who shall be responsible for complying with these court orders and any future court orders.

---

(2)

Supreme Court, U.S.
FILED
SEP 10 2003

No. 03-274

IN THE
SUPREME COURT OF THE UNITED STATES

DUANE LYNN,
PETITIONER,

-vs-

HON. PETER C. REINSTEIN, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA,
RESPONDENT.

and

RICHARD GLASSEL; STATE OF ARIZONA
REAL PARTIES IN INTEREST.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN SUPPORT OF THE PETITION

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1 APP

QUESTION PRESENTED FOR REVIEW

Does the Eighth amendment erect a *per se* bar against States permitting crime victims to offer an opinion on the appropriate sentence in capital cases?

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STATEMENT OF THE CASE

Prior to trial, Petitioner, who is one of the surviving victims in the criminal case tried below, filed a motion to allow the presentation of his opinion at the penalty phase of the capital proceeding regarding what should be the appropriate sentence. The capital Defendant did not object because it was the defense belief that the victim would opine that the death penalty was not appropriate. The defense position was that a victim's life recommendation was allowable but a victim's death recommendation was not.[1] The State's position was that under this Court's interpretation of *Booth v. Maryland*, 482 U.S. 496 (1987) and *Payne v. Tennessee*, 501 U.S. 808 (1991) the victim's opinion regarding what is the appropriate sentence in a capital sentencing proceeding is irrelevant and should not be admitted regardless of whether it was in favor of or opposed to the death sentence. The trial court agreed with the State's position and held that "no capital sentencing recommendation of a victim, be it life or death, is admissible at any phase of these proceedings absent further order of this Court." (Appendix to the Petition at 24.) Petitioner-victim filed a special action challenging this ruling with the Arizona Court of Appeals.

The Court of Appeals accepted jurisdiction of the special action, but denied relief. The court found that under this Court's precedent that the victim's opinion regarding the appropriate sentence was not admissible,

---

[1] The State and Defendant understood that the Petitioner-victim changed his mind when the special action was pending in the Arizona Court of Appeals and would actually opine that the appropriate penalty should be a death sentence. Now and in the Arizona Supreme Court, Petitioner-victim asserts that a life sentence was the sentence recommendation he would have made.

and affirmed the trial court's decision. (Appendix to the Petition at 17-18.) The jury imposed the death penalty without hearing a sentence recommendation from the victims of the crime.

Petitioner-victim sought review of the Court of Appeal's ruling with the Arizona Supreme Court. The Arizona Supreme Court granted review and affirmed the lower court ruling. The Arizona Supreme Court felt bound by this Court's Eighth Amendment jurisprudence regarding whether a victim could make a sentencing recommendation in a capital case. (Appendix to the Petition at 11-12.) This Petition for Certiorari followed.

REASON WHY THIS COURT SHOULD GRANT THE WRIT

Before addressing this Court's Eighth Amendment precedent regarding whether opinion testimony is admissible at a capital sentencing, the State wishes to reiterate the position it has maintained throughout the proceedings below. The State believes that sound public policy considerations mandate that victims have the right to be heard concerning what they believe is the appropriate sentence in a criminal matter—capital or non-capital. However, below the State felt duty bound to argue that Arizona courts should follow the overwhelming body of law finding that victim sentencing recommendations are barred in capital cases. This duty was to preserve the validity of the capital sentence being sought in this case, and those that the State would seek in the future.

However, the State believes that this Court should reconsider its position in this area of the law.

A. *Booth* and *Payne* have set the standards governing the admissibility of victims' opinion testimony at a capital sentencing.

In 1987, this Court held that "the introduction of a [victim-impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." *Booth v. Maryland,* 482 U.S. at 509. In *Booth*, the Court concluded that such information "is irrelevant to a capital sentencing decision, and . . . its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 502–03. The victim-impact testimony at issue in *Booth* concerned descriptions of the victims, the emotional impact of the crimes on the family, and "the

family members' opinions and characterizations of the crimes and the defendant." 482 U.S. at 502.

In *Payne*, this Court overruled its decision in *Booth*, holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne v. Tennessee*, 501 U.S. at 827. The *Payne* court explicitly cautioned, however:

> *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, *and the appropriate sentence* violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

501 U.S. at 830 n. 2 (emphasis added).

B. After *Booth* and *Payne*, the overwhelming majority of courts that have considered the issue have concluded that the opinion of any individual or group regarding whether a sentence of death should be imposed is irrelevant in a capital sentencing proceeding.

The Tenth Circuit Court of appeals was one of the first courts to address the issue presented in this petition. In *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1992), *overruled in part, on other grounds, by Romano v. Gibson*, 239 F.3d 1156, 1169 (10th Cir. 2001), the Tenth Circuit Court interpreted and applied this Court's precedent and came to the same conclusion reached by the Arizona Supreme Court below. The *Robison* court rejected the capital defendant's claim that a due process violation occurred because the trial court refused to allow him to present testimony from family members of the victims opining that they did not believe that the death penalty should be given to the

defendant. The defense contended this testimony would present proper evidence for the jurors to consider. The trial court granted the State's motion to exclude such evidence on the ground that allowing the testimony "would be no more proper" than allowing the State to put on testimony that the death penalty should be given. 829 F. 2d at 1503; *Robison v. Maynard*, 943 F.2d 1216, 1217 (10th Cir. 1991) (affirming *Robison* after *Payne*).

Other courts that have addressed this issue have come to the same conclusion. *See e.g. Greene v. State*, 37 S.W.3d 579, 583-86 (Ark., 2001) (opinion of a victim's family member as to the appropriate punishment is not relevant evidence); *State v. Koskovich*, 776 A.2d 144, 177 (N.J., 2001) (prohibition concerning the appropriate penalty is "intended to apply to testimony either in support of, or in opposition to, the death penalty."); *State v. Treesh*, 739 N.E.2d 749, 776-77 (Ohio, 2001) (reaffirming that after *Payne* "the admission of witnesses' opinions as to the appropriateness of a particular sentence" is prohibited); *State v. Bjorklund*, 604 N.W.2d 169, 214–15 (Neb., 2000) (victims' recommendation about the appropriate sentence violates the Eighth Amendment); *Whitehead v. State*, 777 So.2d 781, 846-47 (Ala.Crim.App., 1999) (family of the victim went beyond evidence deemed admissible by expressing their opinions on what they thought the appropriate sentence should be for defendant); *Livingston v. State*, 444 S.E.2d 748, 750 n.2 (Ga., 1994) (*Payne* did not overrule *Booth's* prohibition that a victim may not opine about the appropriate sentence); *Burns v. State*, 609 So.2d 600, 605 (Fla., 1992) (same).

Petitioner-victim asserts that it is unfair to limit a victim's opinion regarding sentence because there is not a corresponding limitation to non-victim witnesses offered by the defense. The Petitioner-victim is wrong as the prohibition of offering an opinion concerning the appropriate punishment has not been limited to victims. For example, the Alabama appellate courts have upheld the trial court's

denial of a capital defendant's attempt to include opinion testimony from non-victims regarding whether the death penalty should be imposed. In *Taylor v. State*, 666 So.2d 36 (Ala.Crim.App., 1994), the trial court refused to allow testimony from the defendant's family and friends requesting that the jury spare the appellant's life. The trial court sustained the objection of the prosecutor and refused to allow such evidence, because to do so "invades the province of the jury."

> It is the holding of this Court that the opinion of the friends or relatives of the defendant that the defendant should not be sentenced to death is not a relevant mitigating circumstance for the jury to consider at the penalty phase of a capital case.

Taylor v. State, 666 So.2d at 50-53; *aff'd. sub nom.*, *Taylor v. State*, 666 So.2d 73 (Ala. 1995).

After reviewing all of the cases cited above, it is clear that under *Payne* and *Booth,* in a capital sentencing proceeding evidence or testimony relating to the opinions, personal beliefs or feelings of any witness or expert about whether a defendant should or should not receive the death penalty is not admissible. This is true whether the evidence is submitted directly through a specific opinion or request that defendant not be sentenced to death, or indirectly, by defendant's family, friends or loved ones explaining how the loss of the defendant would impact them.

C. The State Agrees with Petitioner-Victim that there exists a split among the lower courts on the issue presented in the petition.

Petitioner-victim is correct that the Oklahoma Court of Criminal Appeals has interpreted *Booth* and *Payne* and determined that crime victims are not precluded under the Eighth Amendment from offering an opinion regarding the appropriate sentence in a capital case. *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App., 2002); *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App., 1997); *but cf. Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir., 2002) (finding that the Oklahoma Criminal Court did not follow clearly established precedent from this Court.) Because the State believes that this Court should overrule the dicta in *Payne* that has prevented crime victims from making sentencing recommendations in capital cases, the State likewise requests that the Court take the case to resolve the disagreement.

D. There is no sound basis to distinguish between capital and non-capital cases, and the courts are in universal agreement that victims should have the right to make sentencing recommendations in non-capital cases.

Many jurisdictions authorize the use of a victim impact statement or similar form of victim input in the sentencing process. *See e.g.* Alaska Stat. § 12.55.022 (1984); Ariz.Rev.Stat.Ann. § 12-253.4 (Supp.1984-1985); Ark.Stat.Ann. § 75-2502(c) (Supp.1983); Cal.Penal Code § 1203(h) (West Supp.1985); Conn.Gen.Stat.Ann. § 54-91c (West Supp. Pamphlet 1962 to 1983); Fla.Stat.Ann. § 911.143 (West Supp.1985); Ind.Code Ann. § 35-38-1-9 (Burns 1985); Iowa Code Ann. § 901.3 (West Supp.1984-1985); Kan.Stat.Ann. § 21- 4604(2) (Supp.1984); La.Code Crim.Proc.Ann. art. 875.B (West 1984);

Me.Rev.Stat.Ann. tit. 17-A, § 1257.2 (Supp.1984-1985); Md. Ann. Code (1957, 1984 Cum.Supp.), art. 41, § 124; Mass.Ann.Laws ch. 279, § 4B (Michie/Law. Co-op.Supp.1985); Minn.Stat.Ann. § 609.115 1b(b) (West Supp.1985); Mont.Code Ann. § 46-18-112 (1984); Neb.Rev.Stat. § 29- 2261 (Cum.Supp.1984); Nev.Rev.Stat. § 176.145 3 (1981); N.J.Stat.Ann. § 2C:44-6.b (West Supp.1984-1985); N.Y.Crim.Proc.Law § 390.30 (McKinney 1983); Ohio Rev.Code Ann. § 2947.051 (Page Supp.1984); Okla.Stat.Ann. tit. 22, § 982 (West Supp.1984-1985); Or.Rev.Stat. § 144.790(2), (4) (1983); R.I.Gen.Laws § 12-28- 3(10) (Supp.1984); S.C.Code Ann. § 16-3-1550 (Law.Co-op.1985); Tenn.Code Ann. § 40-35-207(8) (1982); Vt.Stat.Ann. tit. 13, § 7006 (Supp.1984); Va.Code § 19.2-299.1 (Supp.1984); W.Va.Code §§ 61-11A- 1 to -7 (1984); Wis.Stat.Ann. § 950.04(2m) (West Supp.1984-1985); Fed.R.Crim.P. 32(c)(2)(C). *See generally* Unif. Model Sentencing and Corrections Act § 3-204(9), 10 U.L.A. 78 (Special Pamphlet 1985) (recommending that presentence report include any statement relating to sentencing submitted by the victim of the offense or the investigative agency); *President's Task Force on Victims of Crime* 18, 33-34 (Final Report Dec.1982) (recommending that federal and state governments require victim impact statements at sentencing). Once enacted, state courts have regularly found that a victim's recommendation concerning the sentence to be imposed is not only permissible, but desirable.

As noted by the court in *State v. Johnson,* 463 N.W.2d 352, 356 (Wis. App.,1990):

> We believe that consideration of the comments--even the "wishes"--of a victim is within the sentencing court's prerogatives. Courts are entitled--even encouraged--to consider the rights and interests of the public in imposing a sentence in a particular case. . . . Indeed, we held in *Jones* that consideration of the victim's

> "rehabilitative needs" was a "logical extension" of the universally accepted practice of considering the rights and interests of the public in sentencing offenders.

See also, Ingoglia v. State, 651 A.2d 409, 414 (Md. App.,1995) (agreeing with *Johnson*); *State v. Ross*, 696 P.2d 706, 709 (Ariz. App.,1984) (trial court properly considered victim's recommendation for probation.); *Fryer v. State*, 68 S.W.3d 628, 630 (Tex. Crim. App., 2002) (victims may give sentence recommendation in non-capital sentencing, refusing to apply *Booth*); *State v. Whitten,* 667 A.2d 849, 852-53 (Me.,1995) (court may consider victims sentence recommendation, but not mandated to follow it.): *State v. Tyler*, 565 S.E.2d 368, 378 (W.Va.,2002) (same); *Adams v. State* 951 S.W.2d 722, 725 (Mo. App.,1997) ("the trial court retains its broad discretion to receive any information from any source it deems relevant to the sentencing process, including recommendations as to the appropriate sentence to be imposed").

In *State v. Lindahl* 56 P.3d 589, 596 (Wash. App. Div. 2, 2002) the court noted that Washington statutes allow victims or the survivors of victims, or their representatives, to submit victim impact statements to the court and to personally present a statement at a felony sentencing hearing. In addition, the statutes provide that during a sentencing hearing, the court "shall consider ... any victim impact statement ... and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigating law enforcement officer as to the sentence to be imposed." In interpreting the statute, the Washington Supreme Court has observed that the statute provides "'a baseline a minimum amount of information which, if available and offered, *must* be considered in sentencing.'" (quoting *State v. Mail,* 854 P.2d 1042, 1046 (1993)).

If in the non-capital arena it is a "baseline" or "minimum" that the victim be allowed to opine about the sentence they wish to see imposed, it is baffling to the State that in the capital arena the victim has to be muzzled. If such evidence is "irrelevant" in the capital context, why is it so relevant in the non-capital context? The State can see no logical reason to draw a line in the manner that the courts have drawn it based on *Payne* and *Booth*. The State believes that victims should be able to opine regarding the sentence they wish to see imposed based on the loss of their loved ones. The State respectfully requests that the Court grant certiorari and clarify that the dicta in *Payne* and *Booth* did not erect a *per se* bar to victims opining about the appropriate sentence in a capital case.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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No. 03-274

IN THE

Supreme Court of the United States

DUANE LYNN,
Petitioner,

v.

HONORABLE PETER C. REINSTEIN, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Arizona

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION, PARENTS OF MURDERED CHILDREN, INC., NATIONAL ASSOCIATION OF VICTIM ASSISTANCE, ALLIED EDUCATIONAL FOUNDATION, U.S. SENATOR JON KYL, AND U.S. REPRESENTATIVE JOHN SHADEGG AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2(b) of the Rules of this Court, the Washington Legal Foundation, Parents of Murdered Children, Inc., National Assocation of Victim Assistance, Allied Educational Foundation, U.S. Senator Jon Kyl, and U.S. Representative John Shadegg, respectfully move for leave to file the attached brief as amici curiae in support of the Petitioner.

The Petitioner, Respondent Honorable Peter C. Reinstein, and Real Party In Interest State of Arizona have all consented to the filing of this brief; however, counsel for Real Party in Interest Richard Glassel has been contacted and has indicated that it is unclear who is representing Mr. Glassel in this proceeding; thus, no consent can be given on his behalf until special counsel has been appointed for Mr. Glassel. Accordingly, amici must file this motion as required by Rule 37.2(b) because a party to the case has withheld consent.

INTERESTS OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a national, nonprofit public interest law and policy center based in Washington, D.C., that devotes substantial resources to promoting crime victim rights.

In 1981, WLF published a *Crime Victims Impact Statement Manual* to serve as a model guide for implementing the use of victim impact information at the state level. WLF has appeared as amicus curiae in numerous U.S. Supreme Court and lower federal court cases that are relevant to the instant case, including cases involving victim participation at sentencing hearings. See, *e.g.*, *South Carolina v. Gathers*, 490 U.S. 805 (1989); *Payne v. Tennessee*, 501 U.S. 808 (1991); *United States v. McVeigh*, 106 F.3d 325 (10th Cir. 1997) (amicus brief supporting petition for rehearing *en banc*).

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parents and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared along with WLF as an amicus in several victim-related cases, including *South Carolina v. Gathers* and *Payne v. Tennessee*.

The National Organization for Victim Assistance (NOVA) is a nonprofit membership organization composed of crime victim advocates, survivors of crime and other traumatic events, and their allies and supporters. Founded in 1975, NOVA is the oldest such national association in the worldwide victims' movement. Its four purposes are to be of service to its membership, to offer direct service to victims, to be an educational resource to victim advocates and allied professionals, and to advocate for victim rights and services.

The Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has regularly appeared before this Court as an amicus along with WLF.

United States Senator Jon Kyl is the duly elected Senator from Arizona and is a strong advocate of crime victim rights. He is a prime co-sponsor of Senate Joint Resolution 1 which proposes a Crime Victims Rights Amendment to the United States Constitution. S.J. Res. 1, 108th Cong., 1st Sess. (Jan. 7, 2003). The Resolution, cosponsored by Senator Dianne Feinstein and a bipartisan group of 24 Senators, has been favorably reported out of the Senate Judiciary Committee. Senator Kyl has a deep interest in this Court's victims' rights jurisprudence.

United States Representative John Shadegg is the duly elected Congressman from the 4th District of Arizona and is a strong advocate of crime victim rights. Representative Shadegg is a co-sponsor of House Joint Resolution 48 which proposes a Crime Victims Rights Amendment to the United States Constitution. H.J. Res. 48, 108th Cong., 1st Sess. (Apr. 10, 2003). The Resolution is pending before the House Judiciary Committee. Representative Shadegg has a deep interest in this Court's victims' rights jurisprudence.

All amici believe that the issue presented to the Court by the petition for writ of certiorari is one of national importance that should be resolved by the Court.

For the foregoing reasons, amici curiae respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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Date: September 22, 2003

QUESTION PRESENTED

Does the Eighth Amendment erect a *per se* bar against States permitting crime victims to offer an opinion on the appropriate sentence in capital cases?

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BRIEF OF WASHINGTON LEGAL FOUNDATION, PARENTS OF MURDERED CHILDREN, INC., NATIONAL ASSOCIATION OF VICTIM ASSISTANCE, ALLIED EDUCATIONAL FOUNDATION, U.S. SENATOR JON KYL, AND U.S. REPRESENTATIVE JOHN SHADEGG AS AMICI CURIAE IN SUPPORT OF PETITIONER

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than amicus WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

and family members, POMC provides information about the criminal justice system, and seeks to make that system responsive to the needs of the victim's family. POMC has appeared along with WLF as an amicus in several victim-related cases, including *South Carolina v. Gathers* and *Payne v. Tennessee*.

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All amici believe that the issue presented to the Court by the petition for writ of certiorari is one of national importance that should be resolved by the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of the Case as presented by the Petitioner. In brief, Richard Glassel shot and killed Petitioner's wife, Nila Lynn, at a homeowners association meeting in the presence of Petitioner.

Invoking his rights under Arizona's Victims' Bill of Rights, Ariz. Const. art. 2, § 2.1(A)(4), Petitioner asked the trial court that he be allowed to give an opinion as to the sentence that should be imposed on the defendant, namely, that Glassel should be sentenced to life imprisonment rather than to death. The trial court, Arizona Court of Appeals, and the Arizona Supreme Court all denied Petitioner's request. In the meantime, the jury sentenced Glassel to death. Glassel's appeal of his conviction and sentence is pending in Arizona courts.

In its decision, the Arizona Supreme Court held that "the Eighth Amendment prohibits a victim from making a sentencing recommendation to the jury in a capital case." Pet. App. 4. In doing so, the Court acknowledged that there is a conflict on whether the Eighth Amendment *per se* excludes

victim sentencing recommendations in capital cases, a conflict spawned by this Court's decisions and language in *Booth v. Maryland*, 482 U.S. 496 (1987) and *Payne v. Tennessee*, 501 U.S. 808 (1991). In particular, while *Payne* allowed victim impact evidence in capital cases and thus, overruled *Booth* in that respect, it is unclear whether *Payne* would also allow victim sentencing recommendations in addition to victim impact evidence.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for certiorari to resolve a conflict that has developed over interpretation of its prior decisions in *Booth v. Maryland* and *Payne v. Tennessee*. The Petitioner has amply described the conflicting jurisprudence in this area. *See* Pet. at 7-17. Resolution of this conflict affords the Court the opportunity to provide clear guidance on the constitutional principles that bear on the right of victims to participate fully in the criminal justice process.

Amici primarily support the petition because it raises an issue of national importance regarding victims' rights. Amici submit that victims should have legally-protected rights to participate in the trial and sentencing of criminal defendants. These rights should not be contingent upon the discretion of prosecutors or judges. In recent years, the participation rights of victims have increasingly been guaranteed by state constitutions and statutes, as was the case in Arizona.

I. THE QUESTION OF WHETHER A VICTIM IS CONSTITUTIONALLY BARRED FROM OFFERING AN OPINION ABOUT THE APPROPRIATE SENTENCE IN A CAPITAL CASE IS AN IMPORTANT QUESTION THAT SHOULD BE RESOLVED BY THIS COURT.

The United States Constitution should not be interpreted to invalidate victim-participation rights guaranteed by state law. There is simply no basis in history or "evolving standards of decency" to invalidate such laws, whether in capital or non capital cases. It is irrelevant whether victim participation makes sentences more severe or (as could have been the case here) more lenient. Victim participation provides substantial benefits to the state and to victims as well. The states are entitled to define their criminal process so as to provide a role for victims in making a recommendation as to the sentence to be imposed in a capital case.

A. Legal History Establishes the Constitutional Validity of Victim Participation.

It is a legal fiction of comparatively recent origin that only the government has an interest in the prosecution of crimes. In England prior to the Nineteenth Century, criminal prosecution was primarily the responsibility of the victim. Public prosecutors were actually more common in the colonies at the time of the American Revolution. Still, private prosecution was accepted in the United States at the time the Eighth Amendment was adopted and for some years thereafter.[2] In light of this history, it would be hard to say that

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[2] See Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 Pepp. L. Rev. 117, 125-32 (1984); Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol'y 357, 359-72 (1986); Bruce L. Benson, *The Lost*

the Framers intended the Constitution to preclude a role for victims in the prosecution of crimes.

The shift from private to public prosecution reflects an understanding that crime harms the entire community as well as the specific victims. It was not motivated by a desire to eliminate any role for the victim.[3] Even today, private participation in some kinds of criminal prosecution persists.[4] This Court has recently noted that both the state and the victims of crime share a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998), quoting *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring).

Decisions denying interested parties a role in criminal proceedings typically are descriptive rather than normative. For example, private parties (including victims) have been denied standing to compel enforcement of criminal statutes, but the lack of standing has been related to the absence of any statute conferring a right to sue.[5] This Court's decision in *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), was such a

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Victim and Other Failures of the Public Law Experiment, 9 Harv. J.L & Pub. Pol'y 399, 400-12 (1986). See also Statement of Senator Dianne Feinstein, 146 Cong. Rec. S3249 (May 2, 2000) (surveying historical evidence of private criminal prosecution in America in 18th and 19th centuries).

[3] Abraham S. Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp. Probs. 225, 245 (1984).

[4] See Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 293 n.73 (2003).

[5] Stuart P. Green, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488 (1988).

case. Although stating that the victim has no "judicially cognizable interest in the prosecution or non-prosecution of another." the Court stated pointedly that "Congress may enact statutes creating legal rights, the invasion of which creates standing. . . ." *Id.* at 617, 619 n.3.

B. Arizona Law on Victim Participation Is Typical of a Large Number of Recent Constitutional and Statutory Enactments.

The Arizona Constitution contains a bill of rights for crime victims, including the right to be heard at any sentencing proceeding. Ariz. Const. Art. 2, § 2.1(A)(4). By statute, Arizona has specifically provided that the victim "may present evidence, information and opinions that concern the criminal offense, the defendant, the sentence or the need for restitution at any...sentencing proceeding." Ariz. Rev. Stat. § 13-4426(A). These provisions appear to provide a clear right for the victim to make a recommendation as to the proper sentence to be imposed in any case, including a capital case. The sole basis for the decision of the Court below was its holding that the Eighth Amendment "prohibits a victim from making a sentencing recommendation to the jury in a capital case." Pet. App. 4.

The Arizona constitutional and statutory provisions at issue in this case are typical of a wave of state enactments over the past two decades. These enactments are the product of a movement to recognize and expand the rights of crime victims, which gained substantial momentum in the early 1980s and continues today.[6]

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[6] See Frank Carrington and George Nicholson, *The Victims' Movement: An Idea Whose Time Has Come*, 11 Pepp. L. Rev. 1 (1984); U.S. Dep't of Justice, Office of Justice Programs, Office for Victims of Crime, *New Directions from the Field: Victims' Rights*

A fifty-state survey of these enactments was recently compiled and published by Professor Douglas E. Beloof.[7] This survey shows that crime victims have some right to speak at sentencing in each of the fifty states. This right to speak often does not depend upon whether any party offers the victim's testimony as evidence. By constitution or statute, some forty states provide an explicit or implicit right for the victim to make a sentencing recommendation.[8]

These recent enactments place victim participation on a different foundation than when this Court considered the issue in *Booth* and *Payne*. In those cases, the Court considered whether the state as prosecutor could present victim impact evidence in a sentencing proceeding. In Arizona and many other states today, victims participate independently and as a matter of right.[9]

Extensive victim participation legislation is powerful evidence that such rights are consistent with "evolving standards of decency." At the time of *Booth* and *Payne*, victim impact evidence was a relatively recent innovation. Today, victim participation is a well-established feature of our criminal justice system.

It is worth noting that many European countries have for some time accorded victims substantial rights of participation

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and Services for the 21st Century (1998).

[7] Beloof, *supra* note 4, at 299-305.

[8] *Id.* at 285-87.

[9] See *id.* at 284-94.

in the criminal process.[10] This aspect of comparative law indicates that victim participation in the criminal process is not an outdated vestige of primitive legal cultures.

C. A Right of Victim Participation Encourages Cooperation with Police and Prosecutors, While Discouraging Vigilantism.

When victims of crime perceive that the criminal justice system is not vindicating their interests, support for the criminal justice system, which is crucial to the apprehension and conviction of criminals, declines. "Indeed, the conclusion has become nearly inescapable: a criminal justice system that ignores the interests of or ill treats the victim runs the risk of alienating the person upon whom its success as an institution depends." [11]

Approximately half of all violent crimes are reported to the police, and of those, only about half are reported by the victims of those crimes.[12] Among the reasons why victims opt not to report crimes is the fear that the system is powerless to help them and might further victimize them.[13] Similarly,

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[10] See Cardenas, *supra* note 2, at 384-87; Gittler, *supra* note 2, at 178-81.

[11] Paul S. Hudson, *The Crime Victim and The Criminal Justice System: Time for A Change*, 11 Pepp. L. Rev. 23, 28 (1984).

[12] U.S. Dep't of Justice, Bureau of Justice Statistics Special Report, *Reporting Crime to the Police, 1992-2000* (Mar. 2003).

[13] Robert F. Kidd & Ellen F. Chayet, *Why Do Victims Fail To Report? The Psychology of Criminal Victimization*, 40 J. Soc. Issues 39-50 (1984), cited in G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 Wayne

crime victims often choose not to cooperate with prosecution of the offender, leading to dismissal of many cases.[14] Non-cooperation is caused by both the administrative problem of lack of information, and by the systemic flaw of failing to take victims' reviews and interests into account.[15]

Since victims of crime have already suffered, physically and psychologically, it is not surprising that they choose to avoid involvement in the criminal process. Studies addressing victim involvement in the criminal process suggest that there is a high correlation between victims' satisfaction and their perceptions that they influenced the outcome or that the sentencing authority was sensitive to victim issues.[16] These studies confirm that a greater role for victims in the sentencing process may positively impact on the reporting and investigation of crime.

D. Participation in the Criminal Justice System Helps to Remedy the Traumatic Effects of Crime on the Victim.

Victimization carries with it profound psychological consequences, both immediate and long term, and it is often this psychological injury that has the greatest impact on the

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L. Rev. 7, 21 (1987).

[14] Gittler, *supra* note 2, at 148. See also Hudson, *supra* note 11, at 30.

[15] See Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 Pepp. L. Rev. 15 (1984).

[16] Kilpatrick & Otto, *supra* note 14, at 23-24 (citing J. Herndon & B. Forst, *The Criminal Justice Response to Victim Harm* (1984)).

victim.[17] In addition to crime-related stress caused by feelings of inequity, loss of security, perceived greater vulnerability, and perception of being deviant, crime victims are psychologically affected by the lack of any role in the criminal process. The victim quickly learns that the system's resources "are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands."[18] This realization, combined with the long duration of the capital criminal process, results in a feeling of loss of identify and additional emotional and psychological stress for the victim.[19] Permitting crime victims to participate in the proceedings can eliminate or reduce the potential for further psychological harm by reducing their perception of inequity or helplessness.[20] In particular, participation at the sentencing phase can be a cathartic experience for the victim, which helps bring an end to the psychological suffering that follows victimization.

E. The Constitution Does Not Require a Different Approach to Victim Participation in Capital Sentencing.

It is difficult to understand what theory would justify the use of victim impact evidence in a capital sentencing proceeding but deny to the victim the ability to recommend

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[17] Task Force on the Victims of Crime and Violence, *Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psych. 107 (1985).

[18] *Id.* at 109.

[19] *Id.*; Tom Gibbons, *Victims Again: Survivors Suffer Through Capital Appeals*, 74 A.B.A. J. 64 (Sept. 1988).

[20] Kilpatrick and Otto, *supra* note 13, at 19.

what penalty should be imposed. The distinction between factual and opinion testimony might have some validity if the victim appears merely as a witness. However, as noted above, Arizona law provides for victim participation as a matter of right.

As a practical matter, the views of victims are often considered by prosecutors in deciding what penalty to seek. Allowing these views to be communicated directly to the jury in the sentencing phase does not introduce a new factor into the system for deciding whether to impose capital punishment. It simply allows the views of the victims to be communicated to both decision makers (prosecutor and jury) whose concurrence is required to impose a sentence of death.

There has been a divergence of academic views over the practical impact of *Payne*. Some believe that victim impact evidence has made the imposition of the death penalty more likely, and others have concluded that no such impact can be established.[21]

If there is considerable uncertainty about the practical impact of victim impact evidence, then there must be even more doubt as to the impact of permitting victims to add a recommendation on the penalty to the evidence that is already permitted. Where the likely impact is so vague and speculative, there is no reason to invent a constitutional rule that would invalidate so many state laws that permit victims to make a recommendation in capital cases.

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[21] For varying views expressed in symposia on victim rights, see 88 Cornell L. Rev. 257 (2003), and 1999 Utah L. Rev. 479 (1999).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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